Paper No. 9
JER

THIS DISPOSITION IS NOT
CITABLE AS PRECEDENT OF THE TTAB AUG. 27,99

U.S. DEPARTMENT OF COMMERCE
PATENT AND TRADEMARK OFFICE

_____

Trademark Trial and Appeal Board

_____

In re Field Fresh Foods, Inc.

_____

Serial No. 75/138,629

_____

Evan M. Kent and France D. Lemoine of Russ, August & Kabat for applicant.

Jennifer D. Richard, Trademark Examining Attorney, Law Office 101 (Christopher Wells, Acting Managing Attorney).

_____

Before Rice, Walters, and Bucher, Administrative Trademark Judges.

Opinion by Rice, Administrative Trademark Judge:

An intent-to-use application has been filed by Field Fresh Foods, Inc. to register the mark FIELD FRESH FARMS (FARMS disclaimed) for fresh pre-cut organic vegetables.[1]

Registration has been finally refused under Section 2(d) of the Act, 15 U.S.C. §1052(d), on the ground that

[1] Application Serial No. 75/138,629, filed July 23, 1996 pursuant to the provisions of Section 1(b) of the Trademark Act of 1946, 15 U.S.C. §1051(b), based on applicant's allegation of its bona fide intention to use the mark in commerce.

applicant's mark, if used on or in connection with its specified goods, so resembles the mark FIELD FRESH, registered on the Supplemental Register for fresh pineapple, as to be likely to cause confusion, or to cause mistake, or to deceive.[2]

Additionally, registration has been refused under Section 2(e)(1) of the Act, 15 U.S.C. §1052(e)(1), on the ground that applicant's mark, if used on or in connection with fresh pre-cut organic vegetables, is merely descriptive of them.

Applicant has appealed. Both applicant and the Examining Attorney have briefed the issues before us. An oral hearing was not requested.

We turn first to the refusal to register under Section 2(e)(1) of the Act. In support of the refusal, the Examining Attorney has made of record printouts of portions of 10 articles, from the NEXIS computerized data base of publication and newswire information, showing use of the designation "field fresh" to describe the particular degree of freshness of produce. Examples of these uses are given below (**emphasis** added):

> "The Branch Ranch restaurant in Plant City has been serving fresh vegetables since 1956.

[2] Registration No. 1,184,272, issued December 29, 1981; affidavit Section 8 accepted.

> **Field-fresh** vegetables are its trademark."—from a story headlined "Prices Jump Due to Crop Damage; Frozen Veggies" appearing in the January 24, 1997 issue of *The Ledger*
>
> "… Retail Marketing) has announced its summer locations for selling fresh produce. The producers harvest daily so their fruits and vegetables are **field fresh**."—from a story headlined "Smokies Snag a Father-Son Combo $" appearing in the June 17, 1995 issue of *Knoxville News-Sentinel*
>
> "… local producers who have found a lucrative, new market for their products, as well as consumers, who are able to buy **field-fresh** produce."—from a story headlined "Store Chains in Slugfest Over Local Produce; Large 'Clock' Tells Shoppers When Next Shipment Arrives" appearing in the August 25, 1996 issue of *The Buffalo News*
>
> "The next time you open a can of Glory black-eyed peas or field peas and notice how **field fresh** and down-home delicious they taste, think about Irvin Fortune, an African American farmer in florence [sic], S.C. …"—from a story headlined "Glory Foods partners with African American farmers" appearing in the April 9, 1996 issue of *Michigan Chronicle*
>
> "For those tempted by **field-fresh** corn and other local produce, Hicks' farmstand will be open in August;…"—from a story headlined "Bargain Hunter" appearing in the July 25, 1996 *Newsday*

The Examining Attorney also relies upon the first definition of the term "farm" appearing in Webster's II New

College Dictionary (1995).[3] That definition reads: "Land cultivated for agricultural production."[4]

A mark is merely descriptive if, as used in connection with the goods or services in question, it immediately conveys information about an ingredient, quality, characteristic, feature, etc. thereof, or if it directly conveys information regarding the nature, function, purpose, or use of the goods or services. *See In re Abcor Development Corp.,* 588 F.2d 811, 200 USPQ 215 (CCPA 1978); *In re Eden Foods Inc.,* 24 USPQ2d 1757 (TTAB 1992); and *In re American Screen Process Equipment Co.,* 175 USPQ 561 (TTAB 1972). In contrast, a mark is suggestive if, when

[3] The Examining Attorney first mentioned this definition (and submitted a copy of the relevant dictionary page) in her brief on the case. Ordinarily, evidence submitted after appeal is untimely and will not be considered. See Trademark Rule 2.142, 37 CFR §2.142(d). As the Examining Attorney has noted, however, it is well settled that the Board may take judicial notice of dictionary definitions. *See In re John Harvey & Sons Ltd.,* 32 USPQ2d 1451 (TTAB 1994), and cases cited therein. Accordingly, we have considered the definition cited by the Examining Attorney.

[4] Applicant relies upon the first three definitions of the word "farm" found in Merriam Webster's Collegiate Dictionary (10th Ed. 1996), but applicant offers these definitions for purposes of its arguments relating to the issue of likelihood of confusion, not the issue of mere descriptiveness. The definitions read: "**1** *obs*: a sum or due fixed in amount and payable at fixed intervals **2**: a letting out of revenues or taxes for a fixed sum to one authorized to collect and retain them **3**: a district or division of a country leased out for the collection of government revenues". The fourth definition in this dictionary is "a tract of land devoted to agricultural purposes". When applicant's mark is considered in relation to applicant's specified goods, as it must be, it is clearly this latter significnce which is likely to be conveyed.

the goods or services in question are encountered bearing the term, the potential purchaser must use thought, imagination, perception, and/or a multi-stage reasoning process to reach a conclusion as to the nature thereof. *See In re Mayer Beaton Corp.,* 223 USPQ 1347 (TTAB 1984), and *In re Tennis in the Round Inc.,* 199 USPQ 496 (TTAB 1978). A mark does not have to describe every quality, feature, purpose, function, etc. of the goods or services in order to be found merely descriptive; it is sufficient for the purpose if the mark describes a single significant quality, feature, function, etc. *See In re Venture Lending Associates,* 226 USPQ 285 (TTAB 1985). Further, the question of whether a mark is merely descriptive must be determined not in the abstract, that is, not by asking whether one can guess, from the mark itself, considered in a vacuum, what the goods or services are, but rather in relation to the goods or services for which registration is sought, that is, by asking whether, when the mark is seen on the goods or services, it immediately conveys information about their nature. *See In re Abcor Development Corp., supra,* and *In re American Greetings Corp.,* 226 USPQ 365 (TTAB 1985).

Applicant specifically agrees with the Examining Attorney that the issue of mere descriptiveness must be

determined by considering applicant's mark in relation to its specified goods. Nevertheless, applicant argues that its mark is not merely descriptive because "a consumer would only be able to identify the genre of the product, that is, vegetables, by using imagination, thought and perception." In the same vein, applicant argues that a consumer would not know whether the particular fresh item from the field is manure, a flower, pineapple or a vegetable.

Applicant misunderstands the test. As noted above, the test is not whether a consumer can guess what the goods are from the mark, but rather whether, when the consumer sees the mark on the goods, it immediately conveys information about their nature. In view of the evidence made of record by the Examining Attorney, we have no doubt that when consumers see applicant's fresh pre-cut vegetables bearing the mark FIELD FRESH FARMS, the mark would immediately convey to them the information that these vegetables come from a farm and are very fresh, i.e., as fresh as vegetables recently picked from the field. Accordingly, we conclude that the mark FIELD FRESH FARMS, when applied to fresh pre-cut organic vegetables, is merely descriptive of them.

We turn then to the refusal to register under Section 2(d) of the Act. Considering first the goods, applicant's applicant's specified goods are "fresh pre-cut organic vegetables" and registrant's are "fresh pineapple." Although these goods are specifically different, it is not necessary that the goods be similar or even competitive in order to support a finding of likelihood of confusion. It is sufficient for the purpose that the goods are related in some manner, and/or that the circumstances surrounding their marketing are such that they would be likely to be encountered by the same persons under circumstances that could, because of the marks used thereon, give rise to the mistaken belief that they originate from or are in some way associated with the same source. *See Hilson Research Inc. v. Society for Human Resource Management,* 27 USPQ2d 1423 (TTAB 1993). Here, the products specified in applicant's application and registrant's registration are closely related in that both types of goods are items of fresh produce that would be sold to the same class of purchasers, i.e., consumers, through grocery stores and supermarkets, where they would be displayed in the fresh produce section. Under the circumstances, we are of the opinion that the contemporaneous marketing of these goods by different

entities under the same or similar marks would be likely to cause confusion.

Applicant's argument to the effect that registrant's pineapple is a relatively expensive luxury specialty item from Hawaii, purchased with care by fine food gourmets in exotic fruit boutiques, is unsupported by any evidence. Moreover, such evidence, even if of record, would be to no avail since it is well settled that the issue of likelihood of confusion in a proceeding such as this must be determined on the basis of the identification of goods set forth in the application and cited registration. *See In re Dixie Restaurants Inc.,* 105 F.3d 1405, 41 USPQ2d 1531 (Fed. Cir. 1997); *Octocom Systems Inc. v. Houston Computers Services Inc.,* 918 F.2d 937, 16 USPQ2d 1783 (Fed. Cir. 1990); and *Canadian Imperial Bank v. Wells Fargo Bank,* 811 F.2d 1490, 1 USPQ2d 1813 (Fed. Cir. 1987). It is common knowledge that fresh pineapple is sold in, inter alia, the fresh produce section of grocery stores and supermarkets. In view thereof, and inasmuch as registrant's identification in this case contains no restrictions as to geographic origin, channels of trade, or classes of purchasers, we must presume that registrant's goods include ordinary fresh pineapple sold to ordinary consumers in the fresh produce section of grocery stores and supermarkets.

While fresh pineapple may be somewhat more expensive than fresh vegetables (again, there is no evidence on this issue), both types of goods are relatively inexpensive. Accordingly, we find applicant's argument that fresh pineapple is purchased with care by discriminating consumers unpersuasive.

As to the marks, applicant's mark FIELD FRESH FARMS includes registrant's entire mark FIELD FRESH. Applicant argues, in effect, that registrant's mark is weak, and that the inclusion at the end of its mark of the additional word FARMS results in differences in the marks in sound, appearance, and meaning sufficient to preclude likelihood of confusion. We do not agree. Although registrant's mark FIELD FRESH is merely descriptive (and hence weak), and the registration thereof accordingly issued on the Supplemental Register, the registration nevertheless serves, under Section 2(d) of the Act, as a bar to the registration of a mark which so resembles the registered mark as to be likely to cause confusion. *See Towers v. Advent Software Inc.,* 913 F.2d 942, 16 USPQ2d 1039 (Fed. Cir. 1990), and *In re Clorox Co.,* 578 F.2d 305, 198 USPQ 337 (CCPA 1978). We believe that applicant's mark FIELD FRESH FARMS is such a mark.

The words FIELD FRESH appear first in applicant's mark, where they are most likely to be noticed and remembered. Further, the descriptive term FARMS, which names the physical source of goods such as fresh agricultural products, is extremely weak in trademark significance.[5] Applicant argues that the marks convey different meanings because the term FRESH takes on a different significance when it is followed by the word FARMS in applicant's mark, than it has in registrant's mark. Specifically, applicant, relying upon dictionary

[5] With its brief on the case, applicant submitted the cover sheet, together with some representative cites found, of a search done on the Lexis-Nexis system, for trademarks including the word "farms" in International Class 29. This material was offered to show that there are 410 such registrations, and thus, in applicant's words, that the term "farms" is "highly diluted." Applicant also submitted the cover sheet, and a printout of a representative sampling of registrations found, of another such search to show that in 269 registrations of marks containing the term "farms" in International Class 29, there is a disclaimer of that term. Applicant argues, at pages 8-9 of its appeal brief, that disclaimers "are required only when a term is so highly descriptive as to goods in a certain class that a single entity cannot be granted exclusive rights therein." This evidence is both untimely [Trademark Rule 2.142(d), 37 CFR §2.142(d)] and insufficient to make the third-party registrations of record [In re Smith and Mehaffey, 31 USPQ2d 1531 (TTAB 1994)]. However, we nevertheless agree with applicant's argument (page 9 of applicant's brief) that the term "farms" is weak as applied to food products.

Applicant's brief also mentions, for the first time, a third-party registration assertedly for the mark FIELD FRESH, and a third-party application assertedly for the mark FIELDFRESH, both assertedly for food products. As noted by the Examining Attorney, the registration and application were not made of record by applicant. Accordingly, we have given them no consideration in our determination of this case.

definitions,[6] maintains that in registrant's mark, the term FRESH would likely be regarded as meaning "newly or just come or arrived" to complete the mental image of pineapple "newly come" from the fields. On the other hand, applicant believes that its mark suggests superlative quality, because the term FRESH is placed directly next to the word FARMS, and the prospective purchaser would therefore "mentally select the definition of 'fresh' most often used in connection with 'farms', namely 'free from taint'." The trouble with this argument is that the NEXIS evidence shows that the expression FIELD FRESH has a recognized meaning when it is used in connection with fresh fruits and vegetables. For that reason, FRESH is likely, even in applicant's mark, to be given its recognized meaning as part of the expression FIELD FRESH. Considered in its entirety, applicant's mark suggests that its vegetables come from a farm and are very fresh, that is, as fresh as vegetables recently picked from the field. Registrant's

[6] In Merriam Webster's Collegiate Dictionary (10th Ed. 1996), the adjective "fresh" is defined as "**1 a**: having its original qualities unimpaired: as (1): full of or renewed in vigor: REFRESHED … (2): not stale, sour, or decayed … (3): not faded … (4): not worn or rumpled … **b**: not altered by processing (~ vegetables) **2 a**: not salt **b** (1): free from taint: PURE … (2) *of wind*: moderately strong **3 a** (1): experienced, made, or received newly or anew … (2): ADDITIONAL, ANOTHER … **b**: ORIGINAL, VIVID … **c**: lacking experience: RAW **d**: newly or just come or arrived (~ from school) **e**: having the milk flow recently established … **4** …: disposed to take liberties: IMPUDENT."

mark likewise conveys the significance that registrant's pineapple is very fresh, i.e., as fresh as produce recently picked from the field.

Because of the similarities in the marks, the weakness of the term FARMS in applicant's mark, its placement as the final word of the mark, the relatively inexpensive nature of the goods, their closely related nature, their similar sales environment, and the fact that they are sold to ordinary consumers, we conclude that confusion is likely to result from the contemporaneous use by applicant and registrant of their respective marks on their specified goods. We are of the opinion that customers who encounter applicant's FIELD FRESH FARMS fresh pre-cut organic vegetables in the fresh produce section of their grocery store on one shopping expedition, and then encounter registrant's FIELD FRESH fresh pineapple on a later expedition, or vice versa, are likely to believe that it is the same mark, or, if they remember the difference in the marks, to assume that the marks are simply slight variations of one another used by a single source. Accordingly, we find that the refusal to register under Section 2(d) of the Act is well taken.

Decision: The refusal to register is affirmed on both grounds.

J. E. Rice

C. E. Walters

D. E. Bucher
Administrative Trademark
Judges, Trademark Trial
And Appeal Board